516
38 page
(9)
MAR 28 2007

No. 06-531

# In the Supreme Court of the United States

MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.,
*Petitioners,*

v.

T.A. WYNER, ET AL.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE CENTER FOR INQUIRY, THE CENTER FOR PUBLIC REPRESENTATION, THE INSTITUTE FOR JUSTICE, LIBERTY LEGAL INSTITUTE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, PUBLIC CITIZEN, AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

BRETT DIGNAM
GIOVANNA SHAY
*Yale Law School*
*Supreme Court Clinic*
*127 Wall Street*
*New Haven, CT 06511*
*(203) 432-4800*

ANDREW J. PINCUS
*Counsel of Record*
CHARLES A. ROTHFELD
*Mayer, Brown, Rowe & Maw LLP*
*1909 K Street, NW*
*Washington, DC 20006*
*(202) 263-3000*

*[Additional Counsel Listed on Signature Page]*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... ii

INTERESTS OF THE *AMICI CURIAE* ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 5

A PLAINTIFF WHO OBTAINS A PRELIMINARY INJUNCTION MAY BE A PREVAILING PARTY ENTITLED TO ATTORNEYS' FEES. ..... 5

A. When The District Court Never Enters A Final Ruling On The Merits, A Plaintiff Who Obtained A Preliminary Injunction Frequently May Qualify As A Prevailing Party ..... 7

1. In Many Instances, A Preliminary Injunction Is The Only Effective Relief Available To A Plaintiff. ..... 8

2. A Plaintiff Is A Prevailing Party In A Case Not Finally Resolved On The Merits If The Preliminary Injunction Alters The Legal Relationship Between The Parties And Provides Relief To The Plaintiff. ..... 14

3. A Broad Rule Denying Fees To Plaintiffs Who Win Preliminary Injunctions Would Burden The Courts With Increased Litigation And Prevent Vindication Of Crucial Constitutional And Statutory Rights. ..... 24

B. Except In Rare Circumstances, Plaintiffs Who Win A Preliminary Injunction Are Not Entitled To Fees If They Ultimately Lose The Case. ..... 29

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) ..... 14

*Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001) ..... *passim*

*Carey* v. *Phiphus*, 435 U.S. 247 (1978) ..... 14, 28

*City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983) ..... 14

*City of Riverside* v. *Rivera*, 477 U.S. 561 (1986) ..... 14, 23, 28

*Coalition for Basic Human Needs* v. *King*, 691 F.2d 597 (1st Cir. 1982) ..... 6, 20

*Coalition To Protest the Democratic National Convention* v. *City of Boston*, 327 F. Supp. 2d 61 (D. Mass. 2004) ..... 11

*DeFunis* v. *Odegaard*, 416 U.S. 312 (1974) ..... 12, 13

*Doe* v. *Busbee*, 684 F.2d 1375 (11th Cir. 1982) ..... 29

*Doe* v. *Marshall*, 459 F. Supp. 1190 (S.D. Tex. 1978) ..... 12

*Doe* v. *Marshall*, 622 F.2d 118 (5th Cir. 1980) ..... 6, 12

*Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975) ..... 20

*Evans* v. *Jeff D.*, 475 U.S. 717 (1986) ..... 27

*Franzoy* v. *Templeman*, No. 06-0832 (D.N.M. filed Sept. 7, 2006) ..... 12

*Grano* v. *Barry*, 783 F.2d 1104 (D.C. Cir. 1986) ..... 13

*Haley* v. *Pataki*, 106 F.3d 478 (2d Cir. 1997) ..... 6, 9, 10

*Hanrahan* v. *Hampton*, 446 U.S. 754 (1980) ..... 6, 16, 19

*Hensley* v. *Eckerhart*, 461 U.S. 424 (1983) ..... 23, 24

*Hewitt* v. *Helms*, 482 U.S. 755 (1987) ..... 17, 18, 20, 21

**TABLE OF AUTHORITIES—continued**

**Page(s)**

*Jersey Central Power & Light Co.* v. *New Jersey*,
772 F.2d 35 (3d Cir. 1985) ..... 10, 11
*Kay* v. *Ehrler*, 499 U.S. 432 (1991) ..... 23, 27, 29
*Maher* v. *Gagne*, 448 U.S. 122 (1980) ..... 6, 16, 19
*Marek* v. *Chesny*, 473 U.S. 1 (1985) ..... 15
*Memphis Community School District* v. *Stachura*,
477 U.S. 299 (1986) ..... 28
*Million Youth March, Inc.* v. *Safir*,
63 F. Supp. 2d 381 (S.D.N.Y. 1999) ..... 11
*Palmer* v. *City of Chicago*,
806 F.2d 1316 (7th Cir. 1986) ..... 6, 29, 30
*Rhodes* v. *Stewart*, 488 U.S. 1 (1988) ..... 18
*Select Milk Producers, Inc.* v. *Johanns*,
400 F.3d 939 (D.C. Cir. 2005) ..... 6, 9, 16
*Smyth* v. *Rivero*, 282 F.3d 268 (4th Cir. 2002) ..... 7
*Taylor* v. *City of Ft. Lauderdale*,
810 F.2d 1551 (11th Cir. 1987) ..... 6, 9
*Texas State Teachers Ass'n* v. *Garland Independent School District*, 489 U.S. 782 (1989) ..... 6, 17, 18, 24
*Thomas* v. *National Science Foundation*,
330 F.3d 486 (D.C. Cir. 2003) ..... 16, 22
*Watson* v. *County of Riverside*,
300 F.3d 1092 (9th Cir. 2002) ..... 6, 13, 29
*Webster* v. *Sowders*, 846 F.2d 1032 (6th Cir. 1988) ..... 6
*Williams* v. *Alioto*, 625 F.2d 845 (9th Cir. 1980) ..... 13

## TABLE OF AUTHORITIES—continued

Page(s)

**STATUTES**

7 U.S.C. § 2305 ..... 15
12 U.S.C. § 2607 ..... 15
15 U.S.C. § 1129 ..... 15
15 U.S.C. § 6104 ..... 15
17 U.S.C. § 505 ..... 15
18 U.S.C. § 924 ..... 15
20 U.S.C. § 1415 ..... 15
28 U.S.C. § 1292 ..... 21
28 U.S.C. § 2412 ..... 15
29 U.S.C. § 794a ..... 15
33 U.S.C. § 1365 ..... 15
42 U.S.C. § 1973 ..... 15
42 U.S.C. § 1988 ..... *passim*
42 U.S.C. § 2000e-5 ..... 15
42 U.S.C. § 3613 ..... 15
42 U.S.C. § 6972 ..... 15
42 U.S.C. § 9659 ..... 15
42 U.S.C. § 12205 ..... 15

**LEGISLATIVE MATERIALS**

H.R. Rep. No. 94-1558 (1976) ..... 6, 19
S. Rep. No. 94-1011 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908 ..... 23, 26, 27, 28
H.B. 651, 48th Leg., 1st Sess. (N.M. 2007) ..... 12
S.B. 535, 48th Leg., 1st Sess. (N.M. 2007) ..... 12

**TABLE OF AUTHORITIES—continued**

**Page(s)**

**MISCELLANEOUS**

Randal S. Jeffrey, *Facilitating Welfare Rights Class Action Litigation: Putting Damages and Attorney's Fees To Work,*
69 Brook. L. Rev. 281 (2003) ..... 26, 27

Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant,*
73 Cornell L. Rev. 719 (1988) ..... 26

Carl Tobias, *Rule 11 & Civil Rights Litigation,*
37 Buff. L. Rev. 485 (1989) ..... 27

Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure 2d (2007) ..... 20, 21

## INTERESTS OF THE *AMICI CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian public interest organization with more than 75,000 members nationwide. Americans United is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus* in many of the leading church-state cases decided by this Court. Americans United litigates cases throughout the country, many of which involve circumstances where a preliminary injunction is the only available means of relief.[1]

The Center for Inquiry is a nonprofit, educational organization headquartered in Amherst, New York, with offices in New York City, Washington, D.C., and Los Angeles. CFI is dedicated to promoting and defending reason, science, and freedom of inquiry. CFI and its affiliates have participated as a party or an *amicus* in litigation addressing freedom of religion, free speech, and other fundamental constitutional rights. In many of these cases, CFI seeks preliminary injunctive relief.

The Center for Public Representation is a public interest law firm that has been assisting people with disabilities for over thirty-five years. It is both a state and a nationwide legal center that provides assistance and support to public and private attorneys who represent people with disabilities, as well as federally funded protection and advocacy agencies in

---

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and the parties' letters of consent have been lodged with the Clerk. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* and their counsel have made a monetary contribution to the preparation and submission of this brief.

each of the fifty States. It routinely seeks preliminary injunctions on behalf of persons with disabilities to ensure that their constitutional rights, including their right to life-sustaining care, are protected.

The Institute for Justice is a nonprofit, public interest law center dedicated to advancing the essential foundation of a free society: constitutional protection for individual liberty. Since its founding in 1991, IJ has litigated in federal and state courts across the country protecting property rights, freedom of speech, economic liberty, and educational choice. Like the other *amici*, IJ on occasion seeks to recover attorneys' fees under 42 U.S.C. § 1988 when it successfully defends the rights enshrined in the United States Constitution.

The Liberty Legal Institute is a nonprofit law firm dedicated to the preservation of First Amendment rights and religious freedom. In its commitment to the protection of religious liberties of all faiths, the Institute represents religious institutions and individuals across the country.

People For the American Way Foundation is a nonpartisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has more than 750,000 members and activists nationwide. PFAWF regularly represents parties and appears as an *amicus curiae* in constitutional and civil rights litigation. PFAWF has joined this *amicus* brief because it is critical to the ability of Americans to vindicate important constitutional and statutory rights that the availability of attorneys' fees to prevailing plaintiffs not be diminished.

Public Citizen is a nonprofit, consumer-advocacy organization with approximately 100,000 members nationwide. It appears before Congress, administrative agencies, and the courts concerning the enforcement of a

wide range of health, safety, environmental, and consumer legislation. Public Citizen has represented a party or filed an *amicus* brief in several cases before this Court on attorneys' fees, including *Scarborough* v. *Principi*, 541 U.S. 401 (2004); *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department. of Health & Human Resources*, 532 U.S. 598 (2001); and *Kay* v. *Ehrler*, 499 U.S. 432 (1991).

The Rutherford Institute is an international, nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute joins this *amicus* brief because the prospect of attorneys' fee awards is crucial to maintaining and sustaining the Institute's mission of providing pro bono legal services.

## INTRODUCTION AND SUMMARY OF ARGUMENT

*Amici* frequently find themselves on opposite sides of cases involving the interpretation of the Constitution and federal statutes. But they all have reached the same conclusion regarding the issue here: attorneys' fees are available under 42 U.S.C. § 1988 to plaintiffs who prevail in litigation by obtaining a preliminary injunction. *Amici* also agree that precluding fees in that situation would substantially narrow current law, burden the federal courts with lengthier and more costly litigation designed solely to establish a right to fees, and significantly chill the enforcement of constitutional and statutory rights.

Petitioners broadly argue that fee awards may never be premised upon winning a preliminary injunction. However, this case does not involve the typical context in which plaintiffs base entitlement to fees on obtaining a preliminary injunction. The plaintiff here won a preliminary injunction but ultimately lost at the permanent injunction stage. Much

more common is the situation in which, following entry of the preliminary injunction, the district court does not enter a final judgment on the merits because the case has become moot or the plaintiff has as a practical matter gained all of the relief sought in the complaint and therefore has no practical reason to press the claim further. In that context, fees should be available to a plaintiff who obtains a preliminary injunction as long as that injunction alters the legal relationship of the parties and provides relief to the plaintiff.

In many cases vindicating important federal rights, the *only* judicial relief available to the plaintiff may be a preliminary injunction. The defendant may capitulate after the issuance of a preliminary injunction, adopting new regulations or practices that moot a case or eliminate the plaintiff's incentive to proceed with the case. A preliminary injunction may also vindicate the plaintiff's claim with respect to a one-time event – such as a parade or meeting – and the case may end for the same reasons. Likewise, intervening factors may moot a case after a preliminary injunction has been issued but before the case is finally adjudicated. In all of these scenarios, the preliminary injunction provides the plaintiff with significant – as well as the only necessary or practically available – judicial relief; the district court never enters a final judgment on the merits.

This Court has identified two factors for determining whether a plaintiff's success in litigation confers prevailing party status. First, the plaintiff must obtain a judicially sanctioned "alteration in the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001). Second, that judicial action must provide relief for the plaintiff. *Id.* at 603-04. Many preliminary injunctions fulfill both criteria. This Court accordingly should hold that, when there is no final ruling on the merits, a plaintiff who obtains a preliminary injunction is a prevailing party if the injunction

alters the legal relationship of the parties and provides relief to the plaintiff.

Awarding fees for a preliminary injunction promotes efficient resolution of claims; precluding fees would create perverse incentives to continue litigation solely to recover fees. Moreover, Congress intended fee-shifting to create incentives for attorneys to represent plaintiffs in cases vindicating important constitutional and statutory rights. Many such plaintiffs are represented by solo and small-firm practitioners, who rely on fee-shifting to be able to provide representation in these cases. Ensuring that fees are available for obtaining preliminary injunctions in appropriate cases is necessary to fulfill Congress's intent and to provide sufficient incentives for these attorneys.

When, as in the present case, the district court has addressed the merits of the plaintiff's claim, that judgment will generally supersede the preliminary ruling and determine which party prevailed. If the plaintiff loses on the merits, fees almost always will not be available for work done on the preliminary injunction. In rare cases, however, the final judgment may decide an issue different from that addressed at the preliminary injunction stage. When this occurs, fees should be available for the work done on the successful preliminary injunction.

## ARGUMENT

### A PLAINTIFF WHO OBTAINS A PRELIMINARY INJUNCTION MAY BE A PREVAILING PARTY ENTITLED TO ATTORNEYS' FEES.

Petitioners and the Solicitor General argue that obtaining a preliminary injunction is ***never*** sufficient to qualify a plaintiff as a prevailing party. Pet. Br. 19; U.S. Br. 11. In support of that broad contention, they point to language in *Buckhannon*, 532 U.S. at 605, suggesting that a prevailing party must obtain a final judgment "on the merits."

But this Court has made clear that a consent decree – which, by definition, is not a judicial determination "on the merits" – authorizes a fee award. *Maher* v. *Gagne*, 448 U.S. 122, 129-130 (1980); see also *Buckhannon*, 532 U.S. at 604. A plaintiff may be a "'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'" *Hanrahan* v. *Hampton*, 446 U.S. 754, 756-57 (1980) (quoting H.R. Rep. No. 94-1558, at 7 (1976)).

This Court's holding in *Buckhannon*, therefore, did not turn on the absence of a final judgment "on the merits" but rather on the absence of a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605; see also *Tex. State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (stating that a fee award requires judicial action that "changes the legal relationship between [the plaintiff] and the defendant"). The question here, therefore, is whether a preliminary injunction can constitute a "judicially sanctioned change in the legal relationship of the parties." It plainly can. Indeed, in most instances the very purpose of the preliminary injunction is to effect such a change.

By seeking a rule declaring that preliminary injunctions are categorically insufficient to establish prevailing party status, moreover, petitioners and the Solicitor General urge a dramatic change in the law. Eight courts of appeals have held to the contrary.[2] Abrogating the long-standing approach of

---

[2] See, *e.g.*, *Coal. for Basic Human Needs* v. *King*, 691 F.2d 597 (1st Cir. 1982) (Breyer, J.); *Haley* v. *Pataki*, 106 F.3d 478 (2d Cir. 1997); *Doe* v. *Marshall*, 622 F.2d 118 (5th Cir. 1980); *Webster* v. *Sowders*, 846 F.2d 1032 (6th Cir. 1988); *Palmer* v. *City of Chicago*, 806 F.2d 1316 (7th Cir. 1986); *Watson* v. *County of Riverside*, 300 F.3d 1092 (9th Cir. 2002); *Taylor* v. *City of Ft. Lauderdale*, 810 F.2d 1551 (11th Cir. 1987); *Select Milk Producers, Inc.* v. *Johanns*, 400 F.3d 939 (D.C. Cir. 2005). Only

these courts would significantly increase the burden on federal courts by providing plaintiffs with a strong incentive to prolong litigation ***solely*** to establish entitlement to fees. Further, such a ruling would undermine the incentives that Congress intended to provide for the vindication of constitutional and statutory rights.

Petitioners' blunderbuss approach also ignores the very different contexts in which preliminary injunctions are issued. Most awards of fees based on preliminary injunctions have occurred in cases where – unlike here – the district court never entered a final decision on the merits. In this context, as long as the preliminary injunction alters the legal relationship between the parties and provides some relief to the plaintiff, the plaintiff should be deemed a prevailing party under the fee-shifting statutes.

In contrast, when the district court does reject the plaintiff's claim on the merits, fees almost always should *not* be available for the work done in obtaining a preliminary injunction. The only exception would be the rare case in which the final decision addresses an issue different from the one resolved at the preliminary injunction stage.

### A. When The District Court Never Enters A Final Ruling On The Merits, A Plaintiff Who Obtained A Preliminary Injunction Frequently May Qualify As A Prevailing Party.

This case does not present the typical context in which a plaintiff bases prevailing party status on obtaining a preliminary injunction. Here, the plaintiff won a preliminary injunction but ultimately lost at the permanent injunction stage. Much more typical is the situation in which the district court does not enter a final judgment on the merits because the case has become moot or the preliminary injunction has

---

the Fourth Circuit disagrees. *Smyth* v. *Rivero*, 282 F.3d 268 (4th Cir. 2002).

provided the plaintiff with all of the relief sought in the complaint so the plaintiff has no reason to continue to press his or her claim. Yet the broad rule proposed by petitioners and their *amici* would preclude fee awards for all preliminary injunctions, whether or not they are ultimately resolved on the merits.

We first discuss when a preliminary injunction may not be followed by a decision on the merits; we then explain why the text of Section 1988 and this Court's precedents make clear that fees may be available for work done in obtaining a preliminary injunction in that context; finally, we analyze the increased litigation burden on the federal courts, as well as the decreased incentives for enforcement of constitutional and statutory rights, that would result from adoption of the broad rule advocated by petitioners and their *amici*.

### *1. In Many Instances, A Preliminary Injunction Is The Only Effective Relief Available To A Plaintiff.*

In many cases involving the enforcement of constitutional and statutory rights, entry of a preliminary injunction in the plaintiff's favor may effectively resolve the dispute. For example, a defendant who loses a preliminary injunction may decide that additional litigation is futile and cease the challenged conduct rather than litigate to a final judgment. Moreover, a preliminary injunction may be granted in a suit that pertains to a specific event – such as a parade or demonstration – and the case may become moot after the event takes place. Similarly, material circumstances outside a plaintiff's control may change and moot the case. For instance, a student who seeks relief from his or her school may graduate. In each of these circumstances, a preliminary injunction provides the plaintiff with substantial, as well as the only available, judicial relief.

**a. Defendants Capitulate.** A district court's decision to grant a preliminary injunction generally reflects the court's

belief that the plaintiff has a substantial likelihood of winning a final judgment. After losing at the preliminary injunction stage, defendants often reassess the validity of their position and may choose to cease the challenged conduct rather than continue litigating. The defendant may adopt a new regulation, repeal an ordinance, or alter a practice. In these circumstances, the preliminary injunction will have afforded the plaintiff all the relief that he or she sought. The case may become moot, or the plaintiff may have no practical reason to proceed with the litigation. Critically, and unlike the "catalyst" scenario considered in *Buckhannon*, the changes benefiting the plaintiff are the result of an enforceable alteration of the legal rights between the parties that has a "judicial *imprimatur*." *Buckhannon*, 532 U.S. at 605.

For example, in *Select Milk Producers, Inc.* v. *Johanns*, 400 F.3d 939 (D.C. Cir. 2005), milk marketing cooperatives obtained a preliminary injunction prohibiting implementation of a new price regulation. Before final adjudication, the defendant withdrew the challenged rule, rendering the case moot. The D.C. Circuit held that the plaintiffs were prevailing parties because the "preliminary injunction effected a substantial change in the legal relationship between the parties and provided plaintiffs with concrete and irreversible relief." *Id.* at 946.

In *Taylor* v. *City of Ft. Lauderdale*, 810 F.2d 1551 (11th Cir. 1987), church members filed suit after learning that their church was the only religious group required by the defendant to obtain a solicitation permit in order to seek donations. The district court granted a preliminary injunction to enjoin the permit requirement. *Id.* at 1554. Before final adjudication, however, the city commission voluntarily repealed the challenged ordinance and the case became moot. *Id.* at 1555.

Finally, the plaintiffs in *Haley* v. *Pataki*, 106 F.3d 478, 481 (2d Cir. 1997), were legislative employees whose

salaries were excluded from an interim appropriations bill. The district court granted a preliminary injunction requiring the defendant to continue paying the plaintiffs. Before final adjudication, the defendants capitulated and agreed to payment of the plaintiffs' salaries, mooting the case. *Ibid.* Nonetheless, the preliminary injunction provided the plaintiffs with what they were seeking: a continued paycheck.

In each of these cases, the preliminary injunction gave the plaintiffs the relief they sought. The defendants' subsequent action provided that relief on a permanent basis, either eliminating any practical need for proceeding with the litigation, or mooting the case and denying the plaintiffs an opportunity for a final adjudication.

**b. One-Time Events.** Plaintiffs often come to court seeking a preliminary injunction to enjoin or allow a specific event. For example, a student may seek to prevent a school-sponsored prayer at a public-school graduation or to require a school to permit a religious group to meet; or citizens may seek a permit to gather to protest current events. Plaintiffs may learn that the defendant plans to engage in unconstitutional conduct only a short time before the event is scheduled to occur. In such a case, the district court typically cannot issue a final ruling on the merits, because there is inadequate time for a full trial or summary judgment proceeding. Instead, the plaintiffs' rights are determined solely at the preliminary injunction stage, because once the event has taken place, the case may be moot or the parties may have no interest in pressing the case further. Indeed, the Solicitor General observes that if the claim at issue here had related only to the one-time event of respondents' demonstration, "[respondents] would have lacked standing after [the event] to press the case forward." U.S. Br. 25 n.11.

For example, in *Jersey Central Power & Light Co.* v. *New Jersey*, 772 F.2d 35 (3d Cir. 1985), the plaintiff, a

public utility, sought a preliminary injunction after being denied permission to ship nuclear fuel through New Jersey. A trial court found that the state had violated the Hazardous Materials Transportation Act and granted the utility a preliminary injunction, allowing the shipment to go forward. The case then became moot because "[t]he offending conduct and thus the case for a[] [permanent] injunction dissolved with the subsequent completion of this unique shipment." *Id.* at 40. The plaintiff secured the *entire* relief sought through the preliminary injunction: the plaintiff was able to ship the nuclear fuel.

A similar situation occurs when an organization seeks a preliminary injunction to obtain a permit for a demonstration. In *Million Youth March, Inc.* v. *Safir*, 63 F. Supp. 2d 381, 395 (S.D.N.Y. 1999), the plaintiff won a preliminary injunction requiring the city to issue a previously denied parade permit. The injunction created a judicially enforceable change in the legal relationship between the parties; without the injunction, the plaintiff would not have been allowed to hold a protest. Following the event, the parties voluntarily dismissed the case.

Likewise, in *Coalition To Protest the Democratic National Convention* v. *City of Boston*, 327 F. Supp. 2d 61, 78 (D. Mass. 2004), the plaintiff obtained a preliminary injunction requiring the city to issue a parade permit allowing protests at the 2004 Democratic National Convention. Once the convention was over, the suit no longer presented a live controversy and was soon dismissed. Again, the plaintiffs changed their legal relationship vis-à-vis the city: only because the plaintiffs obtained a preliminary injunction were they allowed to demonstrate.

**c. Intervening Factors.** In some cases, after a court issues a preliminary injunction, the factual or legal circumstances may change and render the case moot.

*Amicus* Institute for Justice, for instance, is currently litigating a case that may soon become moot because of an intervening factor. On September 7, 2006, the plaintiffs filed a suit against members of the New Mexico Interior Design Board. They sought to enjoin the enforcement of a state law allowing unlicensed individuals to practice interior design but prohibiting them from using the description "interior designer" without a license. Complaint, *Franzoy* v. *Templeman*, No. 06-0832 (D.N.M. filed Sept. 7, 2006). The district court granted a preliminary injunction providing the plaintiffs with the entire relief they sought. *Franzoy* v. *Templeman*, No. 06-0832 (D.N.M. Dec. 11, 2006) (order granting preliminary injunction). However, following the preliminary injunction, the state legislature passed a statute repealing the licensing scheme. See S.B. 535, 48th Leg., 1st Sess. (N.M. 2007); H.B. 651, 48th Leg., 1st Sess. (N.M. 2007). That statute, currently awaiting the governor's signature, will moot the case by removing the threat to the plaintiffs' First Amendment rights.

Likewise, a case brought by a student plaintiff may become moot after the student graduates. In *Doe* v. *Marshall*, 459 F. Supp. 1190 (S.D. Tex. 1978), an emotionally handicapped student obtained a preliminary injunction allowing him to play on his high school's football team. The school district appealed the preliminary injunction, but during the pendency of the appeal, the football season ended and the plaintiff graduated. *Doe* v. *Marshall*, 622 F.2d 118, 118-19 (5th Cir. 1980). Although the case became moot, the plaintiff had obtained the entire relief his lawsuit sought.

In *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), a white male challenged the University of Washington Law School's affirmative action program after his application for admission was rejected. DeFunis obtained injunctive relief requiring the school to admit him. *Id.* at 314-15. Upon hearing the case, this Court learned that the school would allow DeFunis – who was then in his final term – to graduate even if the

school were to prevail and the injunction were vacated. *Id.* at 315-16. Accordingly, this Court dismissed the case on mootness grounds without ever reaching a final adjudication. Still, the injunctive relief ordered by the trial court – though never finally adjudicated on the merits – provided DeFunis with the entire relief that he had sought: a legal education from the University of Washington Law School.

Numerous other intervening factors may have a similar effect. In *Watson* v. *County of Riverside*, 300 F.3d 1092, 1093-94 (9th Cir. 2002), the plaintiff police officer was ordered to write a report about an incident in which he was accused of using excessive force. He requested a consultation with an attorney prior to writing the report, but his request was denied. He was ultimately fired. *Ibid.* The officer filed suit and obtained a preliminary injunction to prevent the county from using his report during the administrative appeal of his termination. *Ibid.* Nearly two years later, the district court dismissed his claims for damages, and, because the administrative process had long since concluded, the court held that the claim for permanent injunctive relief was moot. *Ibid.* Nevertheless, the preliminary injunction provided the entire injunctive relief the plaintiff sought: his report was excluded from the administrative proceeding. *Id.* at 1095-96.

In *Williams* v. *Alioto*, 625 F.2d 845 (9th Cir. 1980), the plaintiffs obtained a preliminary injunction that halted a San Francisco police action employing overt racial profiling. More than 600 individuals had been stopped on the street and frisked solely because they were black and generally resembled police sketches of a suspected murderer. *Id.* at 847. The police department appealed the injunction, but before the appeal was heard, the actual murderers were apprehended, convicted, and sentenced. The court of appeals dismissed the action as moot. *Ibid.* Nonetheless, the plaintiffs obtained the entire relief that they had sought: the police action was enjoined. See also *Grano* v. *Barry*, 783 F.2d 1104 (D.C. Cir. 1986) (injunction temporarily prohibiting the

destruction of a historical building pending the results of a ballot initiative rendered moot by the outcome of the election).[3]

### 2. *A Plaintiff Is A Prevailing Party In A Case Not Finally Resolved On The Merits If The Preliminary Injunction Alters The Legal Relationship Between The Parties And Provides Relief To The Plaintiff.*

Parties are generally required to bear their own attorneys' fees. See *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). In the context of claims to vindicate constitutional and statutory rights, however,

---

[3] *Amici* recognize that a civil rights action is not mooted "so long as the plaintiff has a cause of action for damages." *Buckhannon*, 532 U.S. at 608-09. But damages are not always available in cases involving preliminary injunctions. First, compensatory damages are often unavailable because many plaintiffs are unable to show "actual injury" in a manner analogous to a tort injury, which is required for compensatory damages. See *Carey* v. *Phiphus*, 435 U.S. 247, 266 (1978). Second, nominal damages are unavailable when plaintiffs win a preliminary injunction that prevents any violation of their rights. It is precisely these cases – where the preliminary injunction prevents a prospective constitutional injury – that are often mooted after the window of potential injury passes. Third, plaintiffs may be barred from seeking both compensatory and nominal damages by sovereign immunity. See *City of Riverside* v. *Rivera*, 477 U.S. 561, 577 (1986) (plurality opinion). Nor can the doctrine of "capable of repetition but evading review" offer much hope for keeping a case alive, because this doctrine "applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983). Finally, even if a plaintiff could extend a case – which is often impossible – this Court should not adopt a rule that would encourage plaintiffs to continue litigating otherwise-moot claims solely to obtain fees.

Congress has authorized fee-shifting in a number of statutes, including the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, which was enacted in response to *Alyeska*.[4]

These statutes authorize fee awards to a "prevailing party," which this Court has interpreted to refer to a party "who has been awarded some relief." *Buckhannon*, 532 U.S. at 603. Plaintiffs who secure a preliminary injunction certainly fall within the plain language of the statute: they have prevailed on their claim for preliminary relief and thus have obtained "some relief," albeit not a final ruling on the merits.

To determine whether a plaintiff's success is sufficient for prevailing party status, this Court evaluates two factors. First, the plaintiff's success must change the legal relationship between the parties. *Id.* at 604. Second, the plaintiff must obtain judicial relief that is enforceable. *Id.* at 603-04. Some victories for the plaintiff – like successful final

---

[4] While the present case involves 42 U.S.C. § 1988, Congress has adopted the "prevailing party" standard in many other fee-shifting provisions, including 7 U.S.C. § 2305(a) (Agricultural Fair Practices Act), 12 U.S.C. § 2607(d)(5) (Real Estate Settlement Procedures Act), 15 U.S.C. § 1129(2) (Anticybersquatting Consumer Protection Act), 15 U.S.C. § 6104(d) (Consumer Protection Telemarketing Act), 17 U.S.C. § 505 (Copyright Act), 18 U.S.C. § 924(d)(2)(A) (Firearm Owner's Protection Act), 20 U.S.C. § 1415(i)(3)(B) (Individuals with Disabilities Education Act), 28 U.S.C. § 2412(d)(1)(A) (Equal Access to Justice Act), 29 U.S.C. § 794a(2)(b) (Rehabilitation Act), 33 U.S.C. § 1365(d) (Clean Water Act), 42 U.S.C. § 1973(e) (Voting Rights Act), 42 U.S.C. § 3613(c)(2) (Fair Housing Act), 42 U.S.C. § 2000e-5(k) (Equal Employment Opportunities), 42 U.S.C. § 6972(e) (Resource Conservation Recovery Act), 42 U.S.C. § 9659(f) (CERCLA), and 42 U.S.C. § 12205 (Americans with Disabilities Act). See generally *Marek* v. *Chesny*, 473 U.S. 1, 43-51 (1985) (appendix to opinion of Brennan, J., dissenting).

judgments and consent decrees – clearly meet these standards. *Maher*, 448 U.S. at 129-30; see also *Buckhannon*, 532 U.S. at 604. Other victories – such as securing a favorable ruling on a discovery issue or defeating a motion to dismiss – do not meet these standards because they fail to alter the legal relationship between the parties or to provide the plaintiff with judicially enforceable relief sought in the complaint. See *Hanrahan*, 446 U.S. 754.

Unlike either favorable final judgments on the one hand, or procedural victories on the other, preliminary injunctions are not categorically sufficient or insufficient for prevailing party status. Some preliminary injunctions alter the legal relationship between the parties and provide judicially enforceable relief. Others do not. Rather than adopt a blanket rule covering all preliminary injunctions, this Court should instruct lower courts to apply, on a case-by-case basis, the settled standards addressing whether a plaintiff is a prevailing party.[5]

a. To qualify as a prevailing party, a plaintiff must obtain an "alteration in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605. Concurring in *Buckhannon*, Justice Scalia explained that the Court's holding focused on this alteration of the parties' legal relationship:

> The Court today concludes that a party cannot be deemed to have prevailed, for purposes of fee-

---

[5] That is the approach taken by the D.C. Circuit, which has read *Buckhannon* and other precedents to hold that a plaintiff who obtains a preliminary injunction is a "prevailing party" if three conditions are met: (1) "there has been a court-ordered change in the legal relationship between the plaintiff and the defendant," (2) a judgment has been rendered "regardless of the amount of the damages," and (3) judicial relief – more than a mere "judicial pronouncement" – has been granted. *Select Milk Producers, Inc.*, 400 F.3d at 947 (citing *Thomas* v. *Nat'l Sci. Found.*, 330 F.3d 486, 492-93 (D.C. Cir. 2003)).

> shifting statutes such as 42 U.S.C. § 1988, unless there has been an enforceable "alteration of the legal relationship of the parties." That is the normal meaning of "prevailing party" in litigation, and there is no proper basis for departing from that normal meaning.

*Id.* at 622 (Scalia, J., concurring). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship * * *." *Tex. State Teachers Ass'n*, 489 U.S. at 792-93.

To determine whether a judicial order alters the relationship between the parties, this Court has instructed courts to examine the order's effect:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. * * * The real value of the judicial pronouncement – what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*

*Hewitt* v. *Helms*, 482 U.S. 755, 761 (1987) (emphasis in original). Accordingly, plaintiffs who obtain a judicial order changing their legal relationship vis-à-vis the defendant qualify as prevailing parties. In applying the "material alteration of the legal relationship of the parties" test, this Court has noted that "[a]pplication of the principles" to a particular case "is not difficult." *Tex. State Teachers Ass'n*, 489 U.S. at 792-93.

A preliminary injunction *may* fulfill this standard. The injunction may allow the plaintiff to take some action that the plaintiff otherwise could not take, or it may preclude the defendant from taking some action that the defendant otherwise would take. The injunction thus can alter the parties' legal relationship in a way favorable to the plaintiff. And because the injunction is issued by a judge, it carries the "judicial *imprimatur*" required by *Buckhannon*. 532 U.S. at 605. A plaintiff who obtains a preliminary injunction does not leave "the courthouse emptyhanded." *Id.* at 614 (Scalia, J., concurring).

But not all injunctions alter the legal relationship *between the parties*. The Court's decision in *Rhodes* v. *Stewart*, 488 U.S. 1 (1988), illustrates this point. In *Rhodes*, prisoners sought injunctive relief claiming that they had a constitutional right to a particular magazine subscription. *Id.* at 2. The district court ultimately granted some relief. *Ibid.*[6] At the time that the district court issued its order, that court was not aware that one of the plaintiffs had died and that the other had been released from prison. *Id.* at 3. After these facts came to light, this Court denied a request for attorneys' fees because the district court's order failed to "affect[] the behavior of the defendant toward the plaintiff[s]" – the precise standard that *amici* urge. *Id.* at 4 (quoting *Hewitt*, 482 U.S. at 761). *Rhodes* therefore does not stand for the broad proposition the Solicitor General asserts (U.S. Br. 14-15) – that fees can never be awarded if a case becomes moot before final judgment – because the relief there was issued *after* the controversy had been mooted by intervening circumstances.

Contrary to the claim of petitioners and the Solicitor General (Pet. Br. 19; U.S. Br. 11), a litigant need not obtain a

---

[6] Although the relief in *Rhodes*, 488 U.S. at 2, was described as "declaratory," this Court noted that the district court "ordered compliance" with "the proper procedural and substantive standards."

final judgment on the merits to qualify as a prevailing party. In *Hanrahan*, this Court adopted Congress's language in explaining that "a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'" 446 U.S. at 756-57 (quoting H.R. Rep. No. 94-1558, at 7 (1976)). Thus, the Court has held that consent decrees – where there is no final adjudication of a plaintiff's legal claims – entitle a plaintiff to prevailing party status. *Maher*, 448 U.S. at 129-30; see also *Buckhannon*, 532 U.S. at 604 ("In addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees."). Because fees may be available for consent decrees where there is no final judgment on the merits, prevailing party status *cannot* be contingent upon a final judgment on the merits. Rather, a plaintiff prevails by obtaining a judicially enforceable alteration in the legal relationship between the parties.[7]

---

[7] A plaintiff who prevails on a preliminary injunction may both alter the legal relationship between the parties *and* obtain some relief sought in the complaint. That is in stark contrast to a plaintiff who merely succeeds on a motion or appellate proceeding that itself provides no relief to the plaintiff, even if it may alter the legal relationship between the parties. The Solicitor General's reliance on *Hanrahan* is therefore misplaced. In *Hanrahan*, the district court directed a verdict for the defendants, but the court of appeals reversed. The court of appeals' ruling merely remanded the case to the district court and allowed the case to proceed; it did *not* provide any of the relief that the plaintiffs sought in their complaint. Therefore, this Court's reversal of the court of appeals' decision – awarding fees to the plaintiffs solely for securing reversal of the dismissal – says nothing about the proper rule to apply when, as in the context of a preliminary injunction, the district court not only alters the legal relationship between the parties but also provides the plaintiff with relief sought in the

b. In addition to altering the legal relationship between the parties, a prevailing plaintiff must obtain some of the relief sought in the complaint and must obtain that relief from the court. "[R]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Buckhannon*, 532 U.S. at 603 (quoting *Hewitt*, 482 U.S. at 760). Thus, in *Hewitt*, the plaintiff – who had obtained a judicial statement that his rights were violated but no injunctive relief or damages – was not a prevailing party because he had failed to obtain any actual relief. 482 U.S. at 760; see also *Coal. for Basic Human Needs* v. *King*, 691 F.2d 597, 600 (1st Cir. 1982) (Breyer, J.) ("The requirement that the legal success 'achieve some of the benefit the parties sought' merely distinguishes cases in which plaintiffs obtain some substantive relief from those in which the 'victories' are purely procedural.").

Preliminary injunctions in many instances provide the plaintiff with "some relief" sought in the complaint. See, *e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("Although only temporary, the injunction does prohibit state and local enforcement activities against the federal plaintiff pending final resolution of his case in the federal court."). Not only are preliminary injunctions *judicial*, but they constitute judicially *enforceable* relief: "[A] preliminary injunction has all of the force of a permanent injunction during its period of effectiveness * * *. [T]he sanctions of civil and criminal contempt * * * are available to punish any violation of a preliminary injunction." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure 2d § 2947 (2007).[8]

---

complaint. Indeed, *Hanrahan* accords fully with the rule that we suggest.

[8] Congress has recognized the significant effect of preliminary injunctions by permitting interlocutory appeals to be taken from district courts' decisions regarding preliminary injunctions. 28

The relief provided by preliminary injunctions is thus entirely different than the "catalyst" scenario addressed in *Buckhannon*. The *Buckhannon* Court stated:

> We cannot agree that the term "prevailing party" authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the "sought-after destination" without obtaining any judicial relief.

*Buckhannon*, 532 U.S. at 606. The voluntary action taken by the defendant in *Buckhannon* was neither the product of judicial action nor judicially enforceable. A preliminary injunction is both.[9]

Not all preliminary injunctions, however, provide judicial relief "*towards the plaintiff*." *Hewitt*, 482 U.S. at 761 (emphasis in original). Some preliminary injunctions merely preserve the court's ability to provide the relief sought by the

---

U.S.C. § 1292(a)(1). Every court of appeals requires the district court to assess the merits of the plaintiff's claim in granting a preliminary injunction. While "[t]he courts use a bewildering variety of formulations of the need for showing some likelihood of success – the most common being that plaintiff must demonstrate a reasonable probability of success," a key factor in granting a preliminary judgment is a court's assessment of "the validity of the applicant's claim." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure 2d § 2948.3 (2007).

[9] Petitioners argue that *Buckhannon* implicitly rejected this claim because there was a preliminary order in that case. Pet. Br. 32-33. However, the *Buckhannon* plaintiffs did not attempt to justify their fee claim by reference to the parties' stipulated stay order. Indeed, they sought fees for the entire case, not just for the work associated with obtaining the stipulated stay order and therefore could not have relied on the existence of the stay order. Accordingly, *Buckhannon* simply did not address the issue before the Court in this case.

plaintiff if the court later decides that the relief is appropriate. Such injunctions do not afford relief *to the plaintiff*, a necessary condition for a plaintiff to be a prevailing party.

For example, in *Thomas* v. *National Science Foundation*, 330 F.3d 486 (D.C. Cir. 2003), the plaintiff claimed that an agreement between the National Science Foundation and a private contractor regarding Internet domain registration fees constituted an illegal tax because it had not been approved by Congress. The plaintiffs sought restitution of the fees, which were deposited into a fund to pay for future projects relating to the Internet. *Id.* at 488. The district court issued a preliminary injunction temporarily preventing the defendants from spending any money from the fund. *Ibid.* Ultimately, Congress passed legislation ratifying the fee system, which mooted the case. Although the plaintiffs obtained a preliminary injunction, the D.C. Circuit denied attorneys' fees because the injunction did not "afford[] appellees the relief they sought in their lawsuit." *Id.* at 493. The plaintiffs wanted restitution, but the injunction did no more than temporarily freeze the fund. It did not provide relief *to the plaintiffs*.

c. Petitioners and their *amici* advance several policy arguments to support a departure from this Court's long-standing approach to determining whether a party has prevailed. Petitioners first argue that "an interim order deprives defendants of the opportunity to convince the trial court or an appeals court to reverse its initial ruling"; they contend, therefore, that preliminary injunctions should not constitute a basis for a fee award. Pet. Br. 34; see also U.S. Br. 17-20. But in cases where the preliminary injunction is the sole available relief because the case is moot, plaintiffs are equally unable to convince a trial or appellate court that the ruling on the preliminary injunction was correct. It would be unfair to deny fees ***limited to work done in connection with the successful preliminary injunction*** when the litigation cannot continue to a final judgment.

Indeed, although both sides stake a claim for fairness, Congress provided the tiebreaker in passing Section 1988: Congress determined that defendants in constitutional suits are better positioned to pay for the cost of the litigation. See S. Rep. No. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 ("If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.").

One of the *amicus* briefs filed on behalf of petitioners explains: "To the extent that section 1988 is ambiguous, this Court has routinely construed the statute to advance its underlying objective of providing incentives to counsel to bring meritorious civil rights actions." Br. of Nat'l League of Cites, et al. 24 (citing *Kay* v. *Ehrler*, 499 U.S. 432, 436-38 (1991); *City of Riverside* v. *Rivera*, 477 U.S. 561, 577-78 (1986) (plurality opinion)). We agree. Any ambiguity with respect to prevailing party status should be interpreted in the plaintiff's favor.

Next, petitioners' *amici* suggest that awarding attorneys' fees to a plaintiff who succeeds in obtaining a preliminary injunction – but ultimately does not obtain a favorable ruling on the merits – would provide perverse incentives for plaintiffs to bring nonmeritorious claims or to moot cases strategically after winning a preliminary injunction. Br. Nat'l League of Cities, et al. 24-25. This argument ignores that what is at stake here is a party's *eligibility* for fees. The statute makes clear, and this Court has recognized, that district courts possess the discretion to make "equitable judgment[s]" regarding fee awards. *Hensley* v. *Eckerhart*, 461 U.S. 424, 436-37 (1983); see also 42 U.S.C. § 1988(b). If a plaintiff acts in bad faith by engaging in gamesmanship designed to obtain fees, the district court can and should exercise its discretion to reduce – or even deny – the fee award.

In sum, this Court's precedents and the language of Section 1988 require that fees be available for plaintiffs who obtain a preliminary injunction that changes the legal relationship between the parties and that provides the plaintiffs with some sought-after relief. "If the plaintiff has succeeded on any significant issue in litigation *which achieved some of the benefit the parties sought in bringing suit*, the plaintiff has crossed the threshold to a fee award of some kind." *Tex. State Teachers Ass'n*, 489 U.S. at 791-92 (citation and alteration omitted; emphasis added).

### *3. A Broad Rule Denying Fees To Plaintiffs Who Win Preliminary Injunctions Would Burden The Courts With Increased Litigation And Prevent Vindication Of Crucial Constitutional And Statutory Rights.*

Allowing attorneys' fees pursuant to the rule we propose would promote judicial economy and effectuate Congress's intent to provide incentives for attorneys to represent individuals seeking to vindicate constitutional and statutory rights. Holding preliminary injunctions categorically insufficient to justify a fee award, on the other hand, would burden the federal courts with lengthier and more expensive litigation as well as severely undermine the policy interests underlying 42 U.S.C. § 1988 and other federal fee-shifting statutes.

a. Permitting fees for preliminary injunctions in appropriate cases provides incentives to resolve constitutional and statutory claims in a manner that efficiently employs scarce judicial resources. The rule advocated by petitioners, in contrast, would produce substantial ***additional*** burdens on the already-strained resources of the federal courts.

This Court has noted that "a request for attorney's fees should not result in a second major litigation." *Buckhannon*, 532 U.S. at 609 (quoting *Hensley*, 461 U.S. at 437).

Categorically denying fees for obtaining a preliminary injunction would encourage precisely that: plaintiffs who win a preliminary injunction would be forced to pursue claims for nominal damages simply to obtain attorneys' fees. Not only would this approach waste judicial resources by producing scores of "second major litigation[s]," but the legal fees of all parties would inevitably increase while they are litigating over nominal damages.

Ruling that some preliminary injunctions are fee-eligible, by contrast, would eliminate any incentive to continue litigating a case in which the legal issue has been effectively resolved. Shortening litigation decreases the burden on the courts as well as the costs to parties.

Moreover, preliminary injunctions themselves are judicially efficient. They are typically decided at the outset of a lawsuit, at which point both sides have expended relatively little time and few resources on the case. Accordingly, fees incurred in connection with preliminary injunctions necessarily will be lower than fees incurred if the litigation must be pressed through the merits stage.

Finally, allowing fees for preliminary injunctions encourages defendants to settle *before* a court adjudicates the preliminary injunction. As this court held in *Buckhannon*, a plaintiff is not fee eligible if a defendant voluntarily changes its behavior following the filing of a lawsuit but before the court grants any relief. When a defendant believes that the plaintiff is likely to prevail on a preliminary injunction, therefore, the defendant will have an incentive to resolve the dispute before the court issues a preliminary injunction in order to avoid liability for fees if the plaintiff wins the preliminary injunction and the defendant then capitulates. If, however, fees are no longer available based on the issuance of a preliminary injunction, defendants have every reason to take "one free shot" at litigating the preliminary injunction: they can capitulate following entry of the preliminary

injunction and still avoid liability for fees. That means courts will be burdened by more contested preliminary injunction actions – even in cases in which the defendant's chances of winning are remote.

b. Congress enacted Section 1988 and other fee-shifting statutes to enable plaintiffs to enforce their rights. "[C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate important Congressional policies which these laws contain." S. Rep. No. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910. As we have discussed, there are many cases in which the vindication of constitutional and statutory rights occurs solely through issuance of a preliminary injunction. Congress did not mean to exclude the enforcement of these rights from the incentive scheme provided by the availability of attorneys' fees.

Fee-shifting is particularly important in civil rights cases because most plaintiffs are represented by solo practitioners and "local, small-firm lawyer[s]," who must be able to obtain attorneys' fees in order to take these cases. Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719, 767-69 (1988). Institutional litigators, such as *amici*, account for a minority of all constitutional cases. *Ibid.* (noting that "one theme in the literature that our data confirm is that most civil rights litigation is not brought by institutional litigators or by large firms engaging in pro bono activity").

When institutional litigators do bring suits, moreover, they rely substantially on solo practitioners and small firms – who depend upon the availability of fee awards – to act as local counsel and co-counsel. See Randal S. Jeffrey, *Facilitating Welfare Rights Class Action Litigation: Putting Damages and Attorney's Fees To Work*, 69 Brook. L. Rev.

281, 283 (2003) ("[E]conomic incentives play a critical role in what litigation attorneys choose to pursue."); Carl Tobias, *Rule 11 & Civil Rights Litigation*, 37 Buff. L. Rev. 485, 486 n.41 (1989) ("The civil rights bar is comprised essentially of specialized, solo practitioners, who depend on fee shifting and contingency fees for their income.").

In adopting Section 1988, Congress intended to create incentives to encourage solo practitioners and small firms to represent individuals seeking to vindicate constitutional and statutory rights:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nations's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, at 2, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910. The "specific purpose [of § 1988] was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Kay*, 499 U.S. at 436; see also *Evans* v. *Jeff D.*, 475 U.S. 717, 732 (1986) (stating that fee-shifting statutes are part of the "arsenal of remedies available to combat violations of civil rights"). Indeed, in cases where a preliminary injunction is the only practical form of relief – such as cases relating to one-time events – it may be especially difficult to obtain counsel if fees are unavailable for work undertaken in obtaining the preliminary injunction.

Further, in cases involving preliminary injunctions, plaintiffs are generally focused on obtaining equitable, rather than monetary, relief. As we have discussed (see page 14 note 3, *supra*), suits vindicating constitutional rights – such as those involving the religion clauses, due process, free

speech, and free association – will often have little or no potential for a compensatory damages award. See *Carey* v. *Phiphus*, 435 U.S. 247, 266 (1978) (requiring a plaintiff seeking compensatory damages for a violation of constitutional rights to show "actual injury" analogous to tort injury); *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 308-09 (1986) (same). In addition:

> While damages are theoretically available under the statutes covered by § 1988, it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude *or severely limit the damage remedy.* Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

*Rivera*, 477 U.S. at 577 (quoting H.R. Rep. No. 94-1558, at 9 (1976) (emphasis in original)).

The plaintiff's attorney therefore often cannot obtain fees in constitutional rights cases through a percentage-of-recovery, contingency-fee agreement, because no compensatory damages can be awarded. The fee-shifting provisions of Section 1988 and similar statutes are typically the sole means for compensating attorneys in those cases.

If this Court were to adopt petitioners' rule denying fees across the board in these equitable cases, Congress's intent would be significantly undermined. Congress stated that "fee awards are essential if the Federal statutes * * * are to be fully enforced." S. Rep. No. 94-1011, at 5, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913. To give effect to this clear intent, this Court should hold that plaintiffs who obtain at least some of their sought-after relief through a preliminary injunction may be prevailing parties entitled to fees. "The statutory policy of furthering the successful prosecution of meritorious

claims is better served by a rule that creates an incentive to retain counsel in every such case." *Kay*, 499 U.S. at 438.[10]

### B. Except In Rare Circumstances, Plaintiffs Who Win A Preliminary Injunction Are Not Entitled To Fees If They Ultimately Lose The Case.

If a case progresses past a preliminary injunction and the plaintiff also prevails on a final judgment, then the plaintiff is entitled to recover reasonable attorneys' fees, including reasonable fees relating to the preliminary injunction. On the other hand, if the plaintiff wins a preliminary injunction but loses the same issue in a subsequent judgment, the later judgment supersedes the preliminary injunction and the plaintiff is not properly considered a prevailing party. See *Watson*, 300 F.3d at 1096 ("[T]here will be occasions when the plaintiff scores an early victory by securing a preliminary injunction, then loses on the merits as the case plays out and judgment is entered against him – a case of winning a battle but losing the war. The plaintiff would not be a prevailing party in that circumstance.").

For instance, in *Doe* v. *Busbee*, 684 F.2d 1375 (11th Cir. 1982), a preliminary injunction was later supplanted because the court of appeals determined that the district court had granted the preliminary injunction through "a mistake of law." *Id.* at 1382. The later opinion meant that the plaintiff was not a prevailing party. Likewise, in *Palmer* v. *City of*

---

[10] The availability of fees is also significant because the enforcement of constitutional rights is often unpopular. A student seeking to preclude prayer at a public high school commencement and a member of the National Socialist Party seeking a permit to march through Skokie may champion causes that are unpopular. But regardless of one's views about how the claims should ultimately be resolved, these plaintiffs raise important constitutional issues. Their lawyers risk ostracism, professional harm, and harassment. Limiting the availability of fees would weaken the incentives to undertake already unpopular litigation.

*Chicago*, 806 F.2d 1316 (7th Cir. 1986), the plaintiff obtained a preliminary injunction, but the injunction was later reversed on appeal. "[W]hen a judgment on which an award of attorney's fees to the prevailing party is based is reversed, the award, of course, falls with it." *Id* at 1320. When the preliminary injunction is not the last judicial word on the issue decided, the later judicial holding determines which party prevails.

On rare occasions, however, the factual landscape of a case may evolve during the course of the litigation, and consequently the preliminary injunction may address issues quite different than those encompassed within the final judgment. Similarly, litigation may have multiple objectives that are addressed by the court at different times. For instance, an employer who has been preliminarily enjoined from maintaining a policy of refusing to hire women may elect to adopt a height and weight requirement that ultimately withstands judicial scrutiny. While the plaintiff may have lost on the merits with respect to the height and weight requirements, she would have prevailed on her claim regarding intentional gender discrimination.

Similarly, here, respondents should be deemed prevailing parties because, as they explain, the permanent injunction related to a claim distinct from that addressed by the preliminary injunction.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

BRETT DIGNAM
GIOVANNA SHAY
*Yale Law School*
*Supreme Court Clinic*
*127 Wall Street*
*New Haven, CT 06511*
*(203) 432-4800*

AYESHA N. KHAN
RICHARD B. KATSKEE
ALEX J. LUCHENITSER
*Americans United for Separation of Church and State*
*518 C Street, N.E.*
*Washington, DC 20002*
*(202) 466-3234*

*Counsel for Americans United for Separation of Church and State*

RONALD A. LINDSAY
*Center for Inquiry*
*621 Pennsylvania Avenue, S.E.*
*Washington, D.C. 20003*
*(202) 546-2332*

*Counsel for the Center for Inquiry*

ANDREW J. PINCUS
*Counsel of Record*
CHARLES A. ROTHFELD
*Mayer, Brown, Rowe & Maw LLP*
*1909 K Street, NW*
*Washington, DC 20006*
*(202) 263-3000*

*Counsel for Americans United for Separation of Church and State*

DANA BERLINER
*Institute for Justice*
*901 N. Glebe Rd., Suite 900*
*Arlington, VA 22203*
*(703) 682-9320*

*Counsel for the Institute for Justice*

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
*The Rutherford Institute*
*1440 Sachem Pl.*
*Charlottesville, VA 22901*
*(434) 978-3888*

*Counsel for The Rutherford Institute*

ADINA H. ROSENBAUM
BRIAN WOLFMAN
*Public Citizen Litigation Group*
*1600 20th St., NW*
*Washington, DC 20009*
*(202) 588-1000*

*Counsel for Public Citizen*

STEVEN SCHWARTZ
*Center for Public Representation*
*22 Green St.*
*Northampton, MA 01060*
*(413) 586-6024*

*Counsel for the Center for Public Representation*

JUDITH E. SCHAEFFER
*People For the American Way Foundation*
*2000 M St., NW, Suite 400*
*Washington, DC 20036*
*(202) 467-4999*

*Counsel for the People For the American Way Foundation*

HIRAM SASSER
*Liberty Legal Institute*
*903 E. 18th St., Suite 230*
*Plano, TX 75070*
*(972) 423-3131*

*Counsel for the Liberty Legal Institute*

APRIL 2007